Graphic Communications International Union, Local 1-M (Bang Printing, Inc.) *and* Timothy Kelm. Case 18–CB–4076–1

June 11, 2002

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND COWEN

On July 31, 2001, Administrative Law Judge William J. Pannier III issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified below and to adopt the recommended Order as modified.[2] The judge found that the Respondent Union violated Section 8(b)(1)(A) and (2) by reporting the possibility of sexual harassment by Charging Party Timothy Kelm to his Employer in retaliation for his dissident activities. In affirming the judge's finding, we agree with the judge that Union Vice President Stanton's failure to investigate Kelm's conduct, in the absence of any basis to suspect that Kelm had recently engaged in misconduct, is a factor indicating the Union's unlawful motivation. See *General Motors Corp.*, 272 NLRB 705, 711 (1984). Given our finding that the report was made for a retaliatory reason, i.e., to retaliate against Kelm's Section 7 activities, we do not pass on whether a union would otherwise have a duty under the NLRA to investigate allegations that a represented employee engaged in sexual harassment before reporting such allegations to an employer.

In its exceptions, the Union argues that Title VII of the Civil Rights Act of 1964 requires unions to immediately report sexual harassment allegations to management. The Union acknowledges that no court decision so holds, and we have found none. Again, however, given our finding of retaliatory motivation, we need not pass on whether a union has a duty under Title VII to immediately report, i.e., report without investigation, such allegations to the employer.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Graphic Communications International Union, Local 1-M, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(b).

(b) Mail, at its own expense, a copy of the attached notice to all employees employed by Bang Printing, Inc. in Brainerd, Minnesota, who have been represented by Graphic Communications International Union, Local 1-M since September 26, 2000. Such notices shall be mailed to the last known address of each of those employees. Copies of the notice shall be signed by its authorized representative and mailed immediately upon receipt of the forms provided by the Regional Director.

2. Substitute the attached notice for that recommended by the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain collectively on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT attempt to cause Bang Printing, Inc., or any other employer, to investigate, discharge, or otherwise discriminate against Timothy Martin Kelm, or any other employee, to discourage criticism of our performance, or to discourage activities to refrain from continuing to support us, as your exclusive collective-bargaining representative.

WE WILL NOT restrain or coerce you in the exercise of rights protected by the National Labor Relations Act, by reporting to your employer that you may have engaged in misconduct, because you have criticized our performance and have expressed an intention to refrain from continu-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's recommended Order in accordance with our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996); and *Excel Container*, 325 NLRB 17 (1997). We shall also substitute a new notice in accordance with our recent decision in *Ishikawa Gasket American, Inc.*, 337 NLRB 175 (2001).

ing to support us as your exclusive collective-bargaining representative.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of rights guaranteed you by the National Labor Relations Act.

Eddie E. Clopton Jr. and *Pamela W. Scott, Esqs.*, for the General Counsel.

Richard A. Miller, Esq. (Miller O'Brien), of Minneapolis, Minnesota, for the Respondent.

DECISION

STATEMENT OF THE CASE

WILLIAM J. PANNIER III, Administrative Law Judge. I heard this case in Brainerd, Minnesota, on April 25, 2001. On December 28, 2000,[1] the Acting Regional Director for Region 18 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing, based on an unfair labor practice charge filed on October 13, alleging violations of Section 8(b)(1)(A) and (2) of the National Labor Relations Act (the Act). All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based on the entire record, on the briefs which have been filed, and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. THE ALLEGED UNFAIR LABOR PRACTICES

A. Introduction

It is an unfair labor practice, under Section 8(b)(1)(A) of the Act, for labor organizations "to restrain or coerce . . . employees in the exercise of the rights guaranteed by section 7 of the Act." Among those Section 7 rights is "the right to refrain from" forming, joining, or assisting labor organizations. Another is refraining from "bargain[ing] collectively through representatives of [employees'] own choosing."

Section 8(b)(2) of the Act provides that it is an unfair labor practice for labor organizations "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3)" of the Act—that is, "in regard to hire or tenure of employment or any term or conditions of employment to encourage or discourage membership in any labor organization." This factually uncomplicated, but analytically subtle, case presents allegations that both those sections of the Act were violated by Respondent, Graphic Communications International Union, Local 1-M, a labor organization within the meaning of Section 2(5) of the Act.

More specifically, the complaint alleges that on September 26 Respondent reported to the Employer, Bang Printing, Inc,[2] that an employee, Timothy Martin Kelm, had engaged in inappropriate conduct toward female employees, even though Respondent had no legitimate basis for believing that Kelm actually had engaged in such misconduct. It further alleges that by making that report to the Employer, Respondent's ultimate objective had been to retaliate against Kelm for having voiced his unwillingness to support Respondent, and his desire that its representation of the Employer's employees be terminated, thereby restraining and coercing Kelm and other employees in the exercise of the rights protected by Section 7 of the Act. Moreover, it is alleged that Respondent's ultimate objective had been to generate an investigation by the Employer that might cause the latter to discipline, most likely discharge, Kelm. Respondent denies that it had been unlawfully motivated in reporting Kelm to the Employer and, furthermore, points out that there is no evidence whatsoever that it had demanded that the Employer discharge, discipline, or take any particular course of action concerning Kelm's continued employment.

The General Counsel concedes that there is no evidence that Respondent ever made an express demand that the Employer discharge, or otherwise discipline, Kelm. Nevertheless, "direct evidence of an express demand by [a labor organization] is not necessary where the evidence supports a reasonable inference of a union request." (Citations omitted.) *Avon Roofing & Sheet Metal Co.*, 312 NLRB 499, (1993). "It is immaterial that no explicit threat or demand was made," *Carpenters Local 2396 (Tri-State Ohbayashi)*, 287 NLRB 760, 763 (1987), since it is long-settled that the statutory requirement of "cause or attempt to cause" is satisfied by an "efficacious request," *San Jose Stereotypers (Dow Jones & Co.)*, 175 NLRB 1066 fn. 3 (1969), or by "an inducing communication . . . in terms courteous or even precatory." *NLRB v. Jarka Corp. of Philadelphia*, 198 F.2d 618, 621 (3d Cir. 1952). In addition, a labor organization which is the exclusive collective-bargaining representative "of the employees in a bargaining unit . . . has a duty, implied from its status under §9(a) of the NLRA . . . to represent all members fairly," and to refrain from "conduct toward a member of the bargaining unit [that] is arbitrary, discriminatory, or in bad faith." (Citations omitted.) *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 44 (1998). That duty is violated, argues the General Counsel, whenever a labor organization approaches an employer to adversely affect an employee's employment situation, because of that employee's dissident attitude and conduct.

More specifically, the General Counsel argues that, during a meeting with employees of the employer, Respondent's executive vice president, Robert Dean Stanton—an admitted statutory agent of Respondent—had been subjected to criticism of Respondent's bargaining performance by Kelm and other employees. During an informal conversation about those dissident comments, occurring immediately after that meeting, there was discussion about Kelm's forced resignation during early 1998,

[1] Unless stated otherwise, all dates occurred during 2000.

[2] Respondent admits that, at all material times, the Employer has been a Minnesota corporation with principal office and place of business in Brainerd, Minnesota, where it engages in the operation of a book printing facility and, further, at all material times has been engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. That conclusion is based on the admitted allegations that, in conducting those business operations during 1999, the Employer sold goods and services valued in excess of $50,000 which were shipped from its Brainerd facility directly to customers located outside of the State of Minnesota and, in addition, during that same calendar year purchased goods and material valued in excess of $50,000 which it received at Brainerd directly from points outside of Minnesota.

in the face of an allegation of sexual harassment of or, at least, inappropriate conduct toward a female employee, Carole Kraklau. The possible recurrence of such conduct was also suggested. Acting solely on that suggestion, argues the General Counsel, during a meeting the next day with the Employer's human resources manager, Sandra Anderson, Stanton mentioned that Kelm, at least, might be engaging in inappropriate conduct toward a female employee or female employees. The Employer has a published policy against sexual harassment by its employees and, urges the General Counsel, it was reasonably foreseeable that such a report by Respondent would generate an investigation by the Employer of Kelm—an investigation that could lead to discipline, even discharge, of Kelm, depending upon what some female employee or employees *might* choose to say about him. Because Stanton's report to Anderson had been truly motivated by an effort to cause or, at least, attempt to cause Kelm to suffer adverse employment-related action at the hands of his employer, urges the General Counsel, and because Stanton had made that report because of Kelm's dissident comments, Respondent violated the Act.

Not so, counters Respondent. Stanton had not been truly motivated by any dissident activities or comments on the part of Kelm. Rather, he had been genuinely motivated by concern that one bargaining unit member might be harassing one or more female employees who, also, were bargaining unit members. If so, Respondent had no procedures for correcting such misconduct but, of course, the Employer could do so. Thus, when he had spoken to Anderson about Kelm on September 26, Stanton had been doing no more than taking action "necessary to the effective performance of [Respondent's] function of representing its constituency." *Operating Engineers Local 18*, 204 NLRB 681 (1973), enf. denied on other grounds 496 F.2d 1308 (6th Cir. 1974). See also *Stage Employees IATSE Local 720 (AVW Audio Visual)*, 332 NLRB 1 (2000). In consequence, proceeds Respondent's argument, although Kelm may have been restrained and coerced, and while Stanton's report to Anderson may have caused Kelm to be investigated and possibly disciplined, the report to Anderson had not been made because of a statutorily prohibited motivation.

For the reasons set forth *post*, I conclude that credible evidence does not support a conclusion that "the 'true purpose' or 'real motive' behind," *Lummus Corp. v. NLRB*, 339 F.2d 728, 734 (D.C. Cir. 1964), Stanton's report to Anderson about Kelm had been genuine belief that Kelm may have been harassing one or more female coworkers. Instead, a preponderance of the credible evidence establishes that the report to Anderson had been actually motivated by Kelm's expressions of dissatisfaction with continued representation by Respondent. Obviously, an employee is restrained and coerced in the exercise of statutorily protected "refrain from" activities whenever a labor organization, because of that activity protected by Section 7 of the Act, chooses to report possible misconduct by that employee to that employee's employer. Indeed, such reporting represents nothing other than an attempt to cause that employee to be disciplined, should some other employee make a complaint, especially a false one, during the employer's ensuing investigation of such a report motivated by unlawful considerations under the Act. Therefore, I conclude that Respondent has violated the Act in the manner alleged in the complaint.

B. Respondent's Report to the Employer Regarding Kelm

Kelm first became employed at the Employer's Brainerd facility during 1983. He worked steadily there until early 1998 when, under circumstances described below, he resigned.

Apparently Brainerd employees were unrepresented for, at least, most of the 1980s. During approximately 1989 or 1990, a majority of the production and maintenance employees there voted in favor of representation by Respondent. There is no evidence that Kelm had either supported or opposed election of Respondent as the collective-bargaining agent of those employees. And following that election, Respondent represented those employees continuously through the date when the hearing in the instant matter was conducted. By that date, it was representing approximately 105 Brainerd employees of the Employer. Kelm became a member of Respondent. But he never held any office in it and never attempted even to run for office.

At some point, the evidence does not disclose exactly when, the Employer formulated and posted a *"Policy Statement" concerning "Preventing Sexual Harassment in the Workplace,"* in an effort "to maintain a work environment free of sexual harassment." To the extent pertinent, that policy prohibits, "Unwanted sexual advances, requests for sexual favors and other verbal, visual, or physical conduct of a sexual nature," which have "the purpose or result of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment," including "unwelcome verbal behavior such as teasing or joking as well as physical behavior such as patting, pinching, or other inappropriate physical conduct," and "lewd or suggestive pictures, drawings, photos, or gestures." At two points the policy warns of adverse consequences for violation of its proscriptions: "Any employee found to have acted in violation of this policy shall be subject to appropriate disciplinary action which may include discharge," and, "Any willful or deliberate violation of this policy by any employee, or of any procedure devised or implemented to give it force and effect, will be cause for serious disciplinary action, up to and including dismissal." So far as the record shows, the policy was not formulated and published as a result of collective bargaining.

During, apparently, late 1997, Kelm was accused of engaging in conduct which ran afoul of that policy. There is no evidence that Respondent did anything in connection with that accusation nor, moreover, in connection with the ensuing investigation by the Employer of Kelm's asserted misconduct. Apparently, it had been employee Carole Kraklau, on her own, who had made that allegation against Kelm. At the very beginning of 1998, Kelm was summoned to a meeting during which then-Vice President James Lorentz explained that, as a result of the Employer's investigation, Kelm would be fired unless he resigned. Kelm chose to resign, he testified, "because I [did not] want a blemish on my record," even though he maintained that the allegation against him had been a false one.

During the fall of 1999 he was rehired and, thereafter, worked continuously for the Employer through the day of the

hearing. Not everyone agreed that he should have been rehired. It was rumored, at least, that employee Ila McFarlund quit when she learned Kelm had been rehired.

By September 2000 Kelm was working on the third shift—from 11 p.m. until 7 a.m.—as a J-1 large machine operator. During that month, at least, four other employees also had been working on that shift: stock person Robert Hummel, bindery helper Katherine Johnson, large machine operator Devona Schultz, and, starting on September 4, then-bindery worker Teresa Morgan. Kelm's immediate supervisor on that shift was Jerry Waters.

Apparently employee-members of Respondent are obliged to attend periodic meetings. But, Respondent does not maintain any office or other facility in Brainerd. Its office is located in St. Paul, Minnesota, which is a fair distance from Brainerd where the Employer and its employees represented by Respondent are located. So, Respondent arranges to conduct quarterly meetings with those employees in Brainerd. On each of those occasions, its officers conduct three separate meetings there, one with employees working on each of the Employer's three, round-the-clock, shifts. One such set of meetings was conducted on September 25.

Executive Vice President Stanton testified that during the previous set of meetings machine operator Schultz had "discussed the fact that she just felt . . . that it wasn't right that she had to be a member of [Respondent] to work at [the Employer] and over that next three months [prior to September 25] on a number of occasions when I was talking with the shop chairs [stewards] they said that that was something that was being discussed within the shop." In fact, on approximately November 20, Schultz filed a petition for a decertification election among Respondent's production and maintenance employees. Respondent won that election. But only by three votes.

The first of Stanton's three September 25 meetings at the Employer was with third-shift employees. "The first meeting began around 7:15," he testified, with "the third shift people just finishing up for the night," and was conducted at the Brainerd Holiday Inn, which had become the Ramada Inn by the time of the hearing. Accompanying Stanton during that meeting were the two shop chairs at the Employer, David Galbraith and Anthony Banker, both employees of the Employer. According to Stanton's estimate, the 7:15 a.m. meeting lasted "say an hour—a little over an hour maybe—an hour and a half maybe." Of course, that meant that his next meeting with a shift of the Employer's employees would not be occurring until midafternoon; either with swing shift employees before they were scheduled to begin work at 3 p.m. or, alternatively, with day-shift employees after their shift ended at 3 p.m. Thus, seemingly Stanton would be left with some time on his hands between the end of the meeting with third-shift employees and the beginning of the next meeting with a shift of the Employer's employees.

During that third-shift meeting Stanton first discussed events involving Respondent's international body. Then, he testified that he described "what's happening in negotiations and other issues within the local level," and "talk[ed] about issues at" the Employer, after which he "open[ed] the meeting for discussions—for issues currently going on." During that period, Stanton explained, he had "initiated" discussion of whether the Employer's employees had need for continuing representation by Respondent, in light of the shop chairs' above-mentioned between-meetings statements about employee conversations concerning having to be members of Respondent to continue working for the Employer.

In the course of the ensuing exchange about that subject, Stanton acknowledged that Kelm had said, "That he felt that [Respondent] wasn't necessary up there and that he felt [Respondent] was ineffective." Stanton also agreed that Kelm had said that he felt that, instead, employees could handle issues with the Employer through their own attorneys or through the Board. As to the subject of decertification, Stanton testified that "it wasn't the focus, but yes, it was brought up." However, Stanton denied that Kelm had said specifically that he favored decertification. Even so, Stanton acknowledged that, "[f]rom what [Kelm] said I would—yes, make that conclusion," that Kelm favored decertification of Respondent as the bargaining agent of the Employer's employees.

Kelm did not disagree that he had not said specifically that he favored decertification. He testified that he had said, during the meeting, merely that "if a decert was to come through third shift would decert." He further testified that he had told Stanton "that—with the contracts that we have coming up and the ones that we got I don't see us gaining any ground. We have lost ground. There's only two parties that are gaining anything out of this and that's the union and the employer, not—the employees are losing ground."

Stock Person Hummel essentially agreed that Kelm had told Stanton "that he didn't think that the current contract was helping us and basically he wasn't happy with the current contract," and "that he was unhappy with the way the union was handling things." Shop Chair Galbraith agreed that Kelm had said that "he felt we didn't need lawyers to handle—or we could get lawyers to handle this, we didn't need the union to represent us and statements to that affect [sic]." Shop Chair Banker testified that he had "engaged with" Kelm, during the meeting, "on a comparison why or why not we would need a union at" the Employer.

Kelm was not the lone employee who spoke out against Respondent during that 7:15 a.m. September 25 meeting. For example, Hummel testified that "other people on the third shift were dissatisfied with the way things were being handled," and Galbraith testified that "third shift had stronger feelings about" decertification of Respondent. In fact, Galbraith identified, as most vocal during that meeting, "Tim [Kelm], Devona [Schultz] and Chris was pretty vocal." But, he added that, "I suppose Tim" had been the most vocal of those employees. That corroborated Kelm's testimony that he had been the most vocal of the third-shift employees in criticizing Respondent during the meeting. None of the other witnesses—Stanton, Banker, and Hummel—contradicted Kelm's testimony, corroborated by Galbraith, about having been the most outspoken employee in criticizing Respondent's performance during the September 25 meeting with third-shift employees.

After the meeting ended, Stanton and the shop chairs remained in the room. So, also, did some of the third-shift employees. "We are there after the meeting and people do stay

around," Stanton testified, "and then people drift out, yes." "Yes," acknowledged Stanton, during that postmeeting period, he had discussed with the shop chairs "the anti-union sentiments of Kelm and other members at the third shift meeting." "Yes, I guess that would be accurate," Stanton admitted, that during that discussion of antiunion sentiments voiced during the meeting, there also had been mention of Kelm and female coworkers. As to what had been said about that subject, three witnesses—Stanton, Banker, and Hummel—provided testimony. That given by Hummel differed dramatically from that advanced by Stanton and Banker.

Both Banker and Stanton attempted to portray what was said as having started with Hummel taking the initiative to voice concern about Kelm's conduct at the workplace. In other words, Banker and Stanton portrayed what Hummel had said as having been entirely separate from any post-meeting discussion of anti-union sentiments expressed during the meeting.

Banker testified that after the meeting, "I was approached by Bob Hummel." Banker was asked three times during direct examination to describe what Hummel had said. Initially he responded, "Hummel just expressed to me the concerns," and, "Bob had a concern about some inappropriate behavior of one of the people on third shift with a female." Asked to testify what exactly Hummel had said, Banker answered, "Well, he specified Tim and that Tim was acting inappropriately with a certain female. I don't know the girl's name even." Asked to recite the conversation as best he could remember, Banker testified only, "He told me what his concerns were and then I said something to the affect [sic] that I wouldn't know what to do with that or I had no idea of what to do with something like that and that we should tell Dean [Stanton], and therefore we did." Further effort, to obtain a more particularized description of Hummel's purported words from Banker, was abandoned.

Banker testified that he and Hummel then had spoken to Stanton. "Dean was talking with a couple other people on the other side [of the room's table] for a moment, and we brought it to his attention" Banker first testified. Brought what to Stanton's attention? "I believe I told Dean what Bob had just told me, just repeated it to Dean, and Dean said that we would give it to the company in the morning." All else aside, Banker's somewhat unparticularized account displays a bargaining agent announcing that it would report one of the employees it represented, to that employee's employer, on no basis other than a generalized report of, at best, inappropriate action with an unknown female coworker. So far as Banker's testimony shows, no more specific information had been sought from Hummel. That situation did not change after Stanton had given his account of what had been said.

"I received information from one of the shop chairs, Tony Banker, that he had been approached by a coworker, Bob Hummel, and Bob Hummel had made a statement to him that Tim Kelm—that he felt that Tim Kelm was beginning to have inappropriate . . . interactions . . . towards female coworkers," Stanton testified initially. Asked if he had been told by Hummel that Kelm had been making "inappropriate sexual comments," Stanton answered firmly that only "[i]nappropriate comments" had been the words used. Yet, in a prehearing affidavit Stanton had stated, "Hummel stated that Kelm was making inappropriate sexual comments." After the affidavit's account was raised with him, Stanton was asked if he now remembered Hummel saying "sexual." To that, Stanton responded, "I can only say, sir, that I put it in this statement, so at the time I filled this statement out that would have been my recall." Nonetheless, as his testimony progressed, Stanton appeared unwilling to concede that the word "sexual" had been spoken in connection with Kelm's asserted misconduct.

The difference between his testimonial and affidavit accounts was not the only discrepancy which arose from Stanton's testimony about the post-meeting conversation regarding Kelm. Stanton denied that he had spoken to Hummel about the issue of Kelm's conduct: "I did not." Yet, as pointed out above, Banker testified that "we" (he and Hummel) had talked to Stanton. That, also, was the testimony given by Hummel.

In fact, Hummel's testimony thoroughly contradicted that of Banker and Stanton. Most significantly, he did not testify that he had initiated discussion of Kelm's conduct, nor that he had done so by initially approaching only Banker, as the latter claimed. "We sat around and talked afterwards," testified Hummel, "myself, Tony Banker and Dean Stanton." During that period, he further testified, "It was brought up that Tim was not for the union or whatever and somebody stated that Tim had been fired once before for sexual harassment," to which Hummel then "said that if one of the girls on the third shift wanted to complain about it that, you know, they probably could."

Stanton denied only generally that he had spoken to Hummel on September 25 about the subject of Kelm's conduct: "I did not." Accordingly, he never denied with particularity Hummel's description of what had been said after the September 25 third-shift meeting.

Hummel denied having mentioned on September 25 the name of any specific female worker: "I never expressed to a certain female, I said, 'If one of the girls wanted to complain,' but I never expressed a certain girl"; "Not a specific girl." In fact, Hummel denied even that he had had a particular female employee in mind when he had made his September 25 remarks to Stanton and Banker. Banker agreed. Asked if Hummel had named a specific woman, Banker answered, "No, he did not." Banker denied having asked Hummel any follow-up questions regarding who such a potential woman might be. Not only did Stanton not challenge that testimony, about no specific female employee having been named, but he denied—"No, he did not"—that Banker had told him about any particular conduct by Kelm which might be considered inappropriate. Therefore, when Stanton reported to the Employer about Kelm, as described below, he did so on the basis of absolutely no particularized information concerning what Kelm might have done and, further, without even the name of any female employee to whom Kelm might have directed inappropriate conduct. Neither Stanton nor Banker claimed that he had made the least effort to ascertain such information from Hummel, before reporting Kelm to the Employer on the following day.

The usual procedure is for Respondent and the Employer to meet after the former's quarterly meetings with the Employer's employees, to discuss subjects raised during those meetings.

Stanton, Banker, Galbraith, and Anderson agreed that such a labor-management meeting was conducted on September 26.

Anderson testified that, as that meeting was ending, "Dean Stanton said that he wanted to give me a heads up that someone had reported to Tony [Banker] that we had a possible sexual harassment issue on the third shift." According to Anderson, she "asked Dean to give me some more information," and, in response, Stanton said to Banker, "[W]ell, Tony, tell her what you heard." Banker then reported, testified Anderson, "One of the individuals on the third shift, his name is Bob Hummel, came to him and told him that Tim Kelm was harassing a woman on the third shift by the name of Kathy Johnson."

With respect to that testimony by Anderson, Stanton denied only that he had indicated that Johnson was "the victim" of Kelm's actions. He never denied that Banker had told Anderson that the female coworker was Kathy Johnson. Further, Banker never denied having told Anderson that Johnson was the coworker whom Kelm was assertedly harassing.

As to what had been said, Banker testified only, "At the very tail end of the meeting . . . Dean had told Sandy that this was just a heads-up that one of the members had approached us with this information, and that we were just handing it over to her." Banker never described what "information" Stanton had related to Anderson. So, obviously, Banker's testimony was not a complete recitation of what had been said to Anderson on September 26. All else aside, his testimony makes no mention whatsoever even of Kelm.

For his part, Stanton testified initially, "What I told Sandy was that Tony Baker [sic] had been approached by a coworker and that coworker had said that he believed that Tim Kelm was acting inappropriately toward female coworkers." Shortly afterward Stanton added to that account "that that coworker was Bob Hummel." Later he further added that "the opening statement that I made to Anderson" had been that Respondent had no charges and no jurisdiction concerning the allegation by Hummel against Kelm.

Two additional points should be made in connection with what had been reported to Anderson by Respondent on September 26. First, as described in subsection D below, the Employer conducted an investigation of Respondent's September report about Kelm. When that investigation was completed, apparently before Kelm had filed his unfair labor practice charge, Anderson prepared a three-page recitation of "NOTES" concerning Respondent's report and statements made by employees during the ensuing investigation. With respect to what Banker had said to her on September 26, Anderson's notes state, "Tony said that Bob Hummel told him that Kathy Johnson was being harassed by Tim Kelm."

To be sure, Anderson's notes are hearsay. But, "[t]he Board has ruled hearsay testimony admissible when it is probative and corroborated by other evidence." (Citations omitted.) *Operating Engineers Local 12 (Winegardner Masonry)*, 331 NLRB 1669 (2000). There seems no reason to believe that the Board takes a contrary position regarding documentary hearsay.

Anderson's written account of Banker's September 26 remark about Johnson corroborates her above-quoted testimonial account. Cf. *Auto Workers Local 651 (General Motors)*, 331 NLRB 479 (2000). Beyond that, it most likely can be said that the notes had been prepared by a human resources manager "in the course of a regularly conducted business activity," within the meaning of Fed.R.Evid. Rule 803(6). To be sure, there is no showing that "it was the regular practice of [the employer] to make" such notes of an investigation, as is required in order to apply that particular hearsay exception. But the notes were not offered by the General Counsel in support of the complaint's allegations. Instead, they were offered by Respondent, during cross-examination of Anderson. And they were offered without stated restriction. Moreover, no objection or qualification was voiced to subsequent consideration of any aspect of their content. In short, the notes were offered and received without restriction and, consequently, for full consideration.

Second, Johnson testified that, "I just heard that it was me from different people" that Kelm had supposedly harassed: "People just came up and told me they thought it was me." By "people," she agreed, she was referring to "[c]oworkers," as opposed to management officials. Obviously, rumors and shop talk can originate from any number of different sources. However, the record does not suggest any source for Johnson's name, in connection with Respondent's report to Anderson about Kelm, other than what Respondent's officials had been saying. That is, so far as the evidence discloses, only Banker and Stanton could have initially mentioned Johnson's name, as a specific female employee purportedly harassed by Kelm. Yet, as shown by the testimony reviewed above, neither official had any reason to suggest her name to Anderson. That they, or at least Banker, did so is some indication of Respondent's tendency to embellish a charge against Kelm, in an effort to fortify to the Employer what can only be characterized as a vague report to them about some sort of possible "inappropriate . . . interactions" between Kelm and one or more of his female coworkers.

C. Respondent's Explanation of the September 26 Report to Anderson

Banker testified that he had heard that Kelm "had had some inappropriate behavior in the past," and "that he would be released for that kind of behavior," should it be repeated. "I wouldn't want to see anything like that happen again," testified Banker. He claimed to have had "no idea with what to do with that kind of information" related to him by Hummel. So, he asserted, "I made the report [to Stanton] because I didn't know what I should do with [Hummel's] information at all," as sort of "a normal chain [of command] kind of, you know." Banker denied that he had done that only because Hummel had named Kelm. He testified that he would have gone to Stanton regardless of the employee named by Hummel.

Stanton denied that he had made his September 26 report to Anderson because Kelm had expressed antiunion sentiments during the September 25 meeting with third-shift employees. He further testified that he had been concerned only about a possibility of inappropriate conduct being directed toward female employees, and would have made such a report to the Employer even had Kelm been a supporter of Respondent.

Stanton acknowledged that, as of September 26, he had been aware of the 1997 allegations of sexual harassment by Kelm and, also, that Kelm had resigned as a result of information

disclosed by the Employer's investigation of those allegations. By September, testified Stanton, sexual harassment had become "a heightened issue" and, in view "of the past allegations" involving Kelm, Stanton testified that he felt obliged to report to the Employer what Hummel had said on September 25 about Kelm. In that connection, Respondent adduced certain other evidence.

First, Stanton testified, without dispute, that Respondent has no written policy regarding what to do whenever allegations of sexual harassment are voiced about an employee whom it represents. Second, Stanton did not feel that Respondent could take any action on its own to prevent such conduct by one employee it represents against another employee whom it also represents. "Those issues fall outside of the contract," he explained, and "[i]t is not the obligation of [Respondent] to investigate or discipline anything outside of the contract." Such misconduct "need[s] to be handled by the company," with Respondent becoming involved only if an employer does that "inappropriately or disciplines inappropriately," Stanton testified.

In connection with Stanton's motivation for having reported Kelm to Anderson, pursued in some detail was the subject of whether or not Respondent had made any effort to investigate Kelm's conduct between Hummel's statements after the September 25 morning meeting and Respondent's report to Anderson on September 26. Of course, Stanton's testimony described in the immediately preceding paragraph shows, all else aside, that he does not believe it is Respondent's role "to investigate . . . anything outside of the contract," and sexual harassment "issues fall outside of the contract," thus "need[ing] to be handled by the" Employer. Indeed, Stanton freely conceded that he made no effort to investigate any conduct by Kelm, before reporting to the Employer what he assertedly had heard. Nonetheless, in connection with the lack of investigation of what Hummel had said on September 25, Stanton advanced three additional points.

First, he testified, without contradiction, that he was not allowed on Respondent's premises, save for the contractually-specified "purpose of investigating a grievance, and then I have to have the [Employer's] permission, and . . . be accompanied by somebody from management during all the time that I am there." In fact, even the quarterly labor-management meetings, such as the one held on September 26, are conducted at locations other than the Employer's premises. Of course, the two shop chairs—Banker and Galbraith—are employees of the Employer and, accordingly, presumably are regularly on the Employer's premises whenever scheduled for work. However, testified Stanton, "[t]hey are not allowed to do union business on the clock on the premises."

Banker corroborated all of that testimony by Stanton. That is, he testified, Stanton "is not allowed on the company premises," and even the quarterly labor-management meetings are not conducted "on the [Employer's] premises," but must be conducted "at the library." As to performing his own role as shop chair, Banker testified, "you are discouraged" from doing so during working hours. "I try to do any kind of paperwork that I need to do at the shift change, so that I won't cause a problem," he testified.

The second additional point made by Stanton relates to the timing of Respondent's report to Anderson on September 26, the day after the September quarterly meetings with the Employer's three shifts of employees. The seeming haste of the report to Anderson is one factor pointed to by the General Counsel in support of the complaint's allegations. In an effort to nullify such an argument, Respondent points out that it holds meetings with the Employer only quarterly—only on days following quarterly meetings with the Employer's employees. Thus, by September 25, Stanton's September 26 meeting with Anderson had already been scheduled. The next such quarterly meeting with the Employer would not occur until, Stanton testified, "Three months later."

Third, Stanton testified that his September 26 report to Anderson had not been the first instance when he had reported sexual harassment of a bargaining unit member. He testified generally that, "Yes, I have," passed along "allegations of sexual misconduct or inappropriate activity to employers[.]" However, Stanton never identified even one of those employers, other than the Employer. Nor, putting aside any names of people reported, did Stanton describe with any particularity incidents or types of conduct about which he had purportedly made such reports.

The one specific prior incident he did describe with some particularity was, Stanton testified, "a slanderous situation, but I believe it was of a sexual nature" that he had reported to Anderson "early in September, about the September 6, I'm going to say." But, while the target of that assertedly improper activity had been a bargaining unit employee, testified Stanton, the individual engaging in the purportedly improper activity had been a supervisor. Thus, inherently, the situation is not truly comparable to reporting one bargaining unit employee's alleged improprieties toward another bargaining unit employee or toward other bargaining unit employees. Beyond that, there were other problems with Stanton's account of this incident.

Anderson denied flatly that she had been told anything by Stanton, or by any official of Respondent, about a supervisor's harassment of a female employee. She did agree that "there is a grievance out right now dealing with conduct of another individual that [Stanton] feels a supervisor was out of line." But, testified Anderson, Stanton "never contacted me with any information I believe it was sexual harassment . . . of an employee by a supervisor, he has not told me anything like that ever."

Beyond that, Stanton claimed that he had learned about that purported supervisory harassment of an employee from Banker: "She brought it to the attention of my shop chair, Tony Banker." Banker appeared as a witness for Respondent. But, he never corroborated that testimony by Stanton—never testified to having received a report from a bargaining unit employee about a supervisor's sexual harassment.

To the contrary, Banker gave some testimony tending to be at odds with Stanton's testimony about an early September report by an employee about supervisory harassment. For, as set forth at the beginning of this subsection, Banker testified that he had "no idea with what to do with this kind of information" provided by Hummel on September 25. Yet, that testimony seems at least somewhat inexplicable, if Banker truly had

received a report from an employee earlier that same month regarding sexual harassment. If that had actually occurred, then seemingly Banker would have known on September 25 what to do with Hummel's information: follow the same course as he had purportedly followed earlier that same month. Rather than having "no idea with what to do with [Hummel's] kind of information," seemingly Banker would have known on September 25 to take that information to Stanton. Of course, Banker did do that. But, he claimed that on September 25 he had done so out of lack of knowledge about what to do with such a report, instead of based upon any course he assertedly had followed less than a month earlier.

In addition to the problems posed by Stanton's testimony regarding purported prior reports of sexual harassment—the denial by Anderson, the lack of corroboration by Banker, the lack of particularity concerning supposed reports of harassment to other employers—there were some additional problems inherently posed by Respondent's effort to cast legitimacy on its September 26 report to Anderson. For example, it was not really accurate that Respondent would have to wait until December to make such a report, if it failed to do so on September 26. Anderson testified that Stanton could telephone her at any time and talk about union matters. In fact, she testified, without contradiction, that Respondent "contacts us when people are behind in their dues"—that is, "will notify us someone is delinquent in their dues." There is no basis in the record for inferring—much less concluding—that Respondent could not have further investigated Hummel's September 25 statements and, then, written, telephoned or arranged to meet with the Employer after September 26, but before December, to discuss Kelm's conduct, were its investigation to disclose some basis for such a discussion. In short, there is no basis in the evidence for concluding that it had been absolutely essential for Stanton to make his report to Anderson on September 26, under pain of being foreclosed from doing so until December.

Beyond that, no one contested the testimony that shop chairs are discouraged from conducting union business when they are supposed to be working. Probably that comes as no great surprise to anyone. In fact, Anderson testified that, "Frequently shop chairs are only in the press room, which maintains continuous operation," and "I think it's part of their responsibilities of their position to stay at their work station [sic]." Of course, under the Act employers are entitled to expect that employees, even ones who are union officers, will devote full attention to their duties whenever they are performing them.

Even so, there is no basis in the evidence for concluding that the Employer's employees are not free to discuss among themselves whatever they want to discuss during break and lunch periods. That is, there is no evidence that Galbraith and Banker had not been free to speak with third-shift female employees about Kelm during lunch and break periods. Nor, for that matter, is there any basis in the evidence for concluding that one or both of the two shop chairs could not have done so before and after those employees' shifts began and ended. In sum, so far as the record discloses, there were periods during which Banker and/or Galbraith seemingly had ample opportunity to discuss with third-shift female employees whether or not one or more of them were being subjected to inappropriate conduct by Kelm. To the contrary, as discussed in the following subsection, there is some evidence that Galbraith found opportunity to discuss Kelm with a female employee.

As to Stanton, no one contests that his access to employees is restricted whenever those employees are on the Employer's premises—that he is not allowed to simply wander through the Brainerd facility, talking to whomever he desires. But, it was not necessary for him to do so on September 25 to seek additional information about the possibility of misconduct by Kelm. In the first place, no one disputes that Hummel had remained after the meeting with third-shift employees that morning. Seemingly, nothing prevented Stanton from inquiring further from Hummel about specifics of possible misconduct by Kelm: names of purportedly harassed female employees, conduct in which Kelm might have engaged, specific incidents of Kelm engaging in such asserted harassment. But, neither Stanton nor Banker did so. And neither one explained why no effort whatsoever had been made, during the September 25 conversation, to elicit further information from Hummel.

Beyond that, the meeting with third-shift employees had been the first of Respondent's September 25 meetings with employees on each of the Employer's shifts. That first meeting had begun at approximately 7:15 a.m. and, according to Stanton's own estimate, had lasted for approximately an hour to an hour and a half. By the end of that meeting, presumably, day shift employees had already begun their work. Not until after 3 p.m. would Stanton be able to meet with them. To be sure, he may have met with swing shift employees before they began their shift at 3 p.m. Even so, however, he would seemingly not be doing so until sometime between 1:30 and 3 p.m. That time line is significant. For it shows that Stanton had some time on his hands between the end of his first meeting, with third-shift employees, and the beginning of his next meeting with a shift of the Employer's employees.

Respondent has not contended that it lacks addresses or, at least, telephone numbers of employees it represented at the Employer. It was conducting its meeting with those employees at a motel, where presumably public telephones are available. Seemingly, therefore, it had ample opportunity to attempt contacting some third-shift female employees, between 9 a.m. and 1:30 p.m., by visit or phone call, concerning Kelm. In fact, during that same period Stanton seemingly had an opportunity to attempt to contact Kelm, to ascertain his position on any accusation about his conduct involving female coworkers. But, Stanton never did that.

In addition, Stanton returned to Brainerd on the following day, for the labor-management meeting with the Employer. Seemingly, on that morning another opportunity existed for him to speak with Kelm and/or third-shift female employees—after they completed their shift and were leaving work for the day. Again, however, Stanton made no apparent effort to do so. Other than his general assertion of no obligation to investigate non-contractual misconduct, Stanton never advanced any explanation for having foregone those opportunities to further investigate, with Kelm and third-shift female employees, what Hummel had said about Kelm during the morning of September 25.

D. Investigation and Clearance of Kelm

After hearing Respondent's September 26 report, the Employer undertook an investigation of Kelm's conduct. Kelm learned about Respondent's report during the day on September 27. He had telephoned then-Vice President Lorentz to discuss vacation time that Kelm felt he was owed. During that telephone conversation, Lorentz said that he had "a letter of inappropriate touching from the union." Lorentz did not appear as a witness, though there is neither evidence nor representation that he was not available to testify. So, the record is devoid of explanation for his remark to Kelm about "a letter . . . from the union." In any event, Kelm testified that he had told Lorentz, "I did not touch anybody," and "just hung up the phone," after Lorentz had replied, "Well, that's what we have here."

That same morning Anderson, who was assigned responsibility for investigating possible misconduct by Kelm, spoke with Third-Shift Supervisor Jerry Waters. Waters also did not appear as a witness though, again, there is neither evidence nor representation that he was not available to testify. Anderson testified that she asked Waters "if he had heard of anything or observed anything or had received any complaints and he said that, no, to answer all those questions," after which Anderson told him "to be aware to be extra careful to watch what was going on" during his shift. That was the extent of Anderson's testimony about her conversation with Waters during her investigation of Kelm's conduct. But her notes, described in subsection C above, recite certain additional statements made by Waters.

"Jerry said the only circumstance involving Tim and *any* female was on Monday evening 9/25/00 Tim had walked up to Teresa Morgan, nudged her with his arm and leaned into her," the notes recite. They continue, "Jerry told Tim to 'Watch it with the ladies' and Tim asked why he was telling him that, and Jerry replied 'Because it's my job.'" The notes regarding that incident conclude, "Jerry told Sandy [Anderson] that Tim is playful, and Teresa gives it right back." Of course, that incident occurred after Hummel's post-meeting remarks to Stanton and Banker during the morning of September 25.

As mentioned in subsection B above, Morgan was one of three third-shift female employees with whom Kelm had been working during September. During early October she was transferred to the position of floor coordinator. When she appeared as a witness for Respondent, she gave some testimony which was damaging to Kelm, as described below. Interestingly, however, when testifying she made no mention whatsoever of the September 25 "nudg[ing]" incident referred to in Anderson's notes.

Kelm had been put on notice by Lorentz about Respondent's report to Anderson, as described above. When he reported for work that night, for his scheduled 11 p.m. starting time, he spoke about what had been said by Lorentz to both large machine operator Devona Schultz and bindery helper Katherine Johnson. Schultz testified that, "when I came to work," Kelm had told her "that someone had accused him of inappropriate touching." Johnson testified that Kelm had "said that we couldn't do no more goofing off, fooling around, throwing glue anymore," and later had asked her "if he had ever touched me inappropriately." She further testified that she had replied in the negative to him and, in turn, had asked why Kelm was asking that. According to Johnson, Kelm "then told me that somebody had turned him in for doing that."

By way of explanation, glue-ball tossing among Kelm and at least two other third-shift employees appears to have been a sometimes game to relieve job-monotony. "We all did," testified Johnson, when asked if jokes were told and things were thrown around during third shift. "Everybody on the third shift did the same thing," she reiterated. "Yes," answered Schultz, when asked if she had seen Kelm and others throwing glue balls around. "A couple times," testified Schultz, she had done that herself. "It's just to break the monotony because it does get boring," Kelm testified. Moreover, he testified, there had been at least one occasion when a glue ball thrown at him had landed in his shirt pocket. Conversely, he testified that there had been at least one occasion when he threw a glue ball at Johnson and it had landed in her T-shirt pocket, though he denied having aimed it to land there. Apparently that occurrence did not disturb Johnson. She made no mention whatsoever of it when testifying.

As to other third-shift conduct, Schultz and Johnson each testified that they exchanged jokes with Kelm. "We all did," testified Johnson, when asked if Kelm told jokes. Johnson agreed that some of those jokes were a little off-color. Schultz acknowledged that Kelm told jokes, but she did not agree—"I don't believe so"—that occasionally his jokes had some sexual innuendoes. Interestingly, Hummel agreed that he had told the Regional Office's investigator that talk during breaks sometimes became "a little off color." Yet, he added, "It does on the day shift too now that I'm on it." Moreover, he acknowledged that such joking had been engaged in by both males and females.

In fact, Hummel never singled out Kelm as having engaged in any specific conduct that Hummel, at least, considered to have been inappropriate. Furthermore, Johnson and Schultz each denied having ever been sexually harassed by Kelm, having seen Kelm sexually harass any other third-shift female worker and, finally, having ever seen Kelm sexually harass any of the Employer's female employees. Which leads to certain above-mentioned testimony given by Teresa Morgan.

During cross-examination a series of clearly pointed questions were put to Kelm. He was asked if he had asked Morgan to go have coffee or lunch with him. "Coffee—I asked everybody on our shift goes out for coffee and I invite all of them" he answered, but, "Lunch, no." He was asked if he had invited Morgan to a casino. "No," he responded. "No," he answered, when asked if he remembered telling jokes with a sexual connotation around Morgan and others; "No, not that I recall." He was asked if any female at the Employer ever told him to quit talking to her. "No," he responded. "No," he answered, when asked if any woman had told him she did not like the way he was talking to women. When called as a witness by Respondent, Morgan gave testimony contradicting many of those denials, though her testimony is hardly a model of reliability for a conclusion that Kelm had sexually harassed Morgan or any other female employee.

Asked during direct examination if Kelm had asked her for a date, Morgan responded, "Well, yeah, going to the casino and

going out for coffee, he would ask me to go." Of course, at least ordinarily, a mere request for a date, of itself, hardly rises inherently to the level of sexual harassment. Morgan never did describe with particularity what Kelm had assertedly said to her about "going to the casino." So, there is no basis for inferring that he had done so in some sort of inappropriate manner.

During cross-examination she was asked if it were not true that, as he had testified, Kelm would invite the whole shift for coffee and, further, everybody had gone for coffee. "I don't know, I never went," Morgan answered initially. Then she did acknowledge that, "I heard them talking about going out, yah." Morgan never did testify about any occasion when Kelm had asked her to go for coffee by themselves. So, there is no basis for inferring any sexual harassment from Kelm's inquiries to Morgan about joining the shift for coffee after work.

She also testified that Kelm had thrown glue balls at her. However, as described above, that was a somewhat common recreation among at least some of the Employer's third-shift employees. "I mean, there was—I mean, there was a lot of going—you know, and people—it was back and forth—" she began to answer, before being cut off with another question. Even so, with respect to glue-ball tossing, she earlier testified, "I mean, there was a lot of glue. It was back and forth." In other words, Morgan appeared to be acknowledging that glue-ball tossing was engaged in by employees other than Kelm, as well as by Kelm. At no point did she attribute such activity only to him. At no point did she testify that she had objected to that game. At no point did she claim that she had regarded glue-ball tossing as some sort of sexual harassment or as inappropriate conduct of a sexual nature.

What she did appear to be trying to portray as having constituted such conduct were incidents, first raised during her direct examination, when "there had been times that he talked to me and it was inappropriate and I had asked him not to talk to me that way so we didn't have a problem with it. I mean, it stopped after that." Asked later during direct examination what comments Kelm had made to her, Morgan answered, "I don't really remember what some of them were, I mean, one time it was about my ass in the jeans I had on that I—I mean, some of the other ones I don't remember." When that subject was revisited again during direct examination, Morgan testified, "I just told him if he couldn't carry on a normal conversation or whatever with me, that he didn't need to talk to me," but, once more, "I can't remember what was said or nothin', I just—I just told him if he couldn't talk to me normal, don't-—you know, don't talk to me at all."

As an objective matter, it seems peculiar that someone would remember her/his own response to assertedly offensive remarks by someone else, but would not recall what those assertedly offensive remarks had been. Yet, that was the position that Morgan continued to assert during cross-examination. "It wasn't an argument, it was just something that he had said that bothered me, and I said, 'If you couldn't talk to me in a human way, then don't talk to me at all,'" she claimed. "No, I don't. I don't remember word for word what was said, no just that it bothered me," she next testified. Well, she next was asked, "it wasn't sexual, was it?" Morgan answered, "Well, it had something to do with something like that, but I don't remember what it was, whether it was, you know, 'Let's go out and do somethin' or whether–I don't remember." She ended her testimony regarding the substance of Kelm's supposed remarks to her by testifying, I'm just saying that—somethin' that bothered me, and I told him, you know, 'If you can't talk to me in a human or normal conversation, don't say anything.'"

In the final analysis, there is no firm basis based on Morgan's testimony for concluding that anything said by Kelm to her can fairly be characterized as sexual harassment or, even, as inappropriate in a sexual sense, as opposed to some sort of argument between a male and female employee concerning some subject never explained. Certainly, a conclusion of sexual harassment or inappropriateness cannot be based upon a showing of no more than "genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex." *Oncale v. Sundowner Offshore Services*, 523 U.S. 75, 81 (1998). Beyond what Morgan's testimony fails to establish, moreover, certain objective factors further call into question the credibility of any testimony by her about supposed inappropriate conduct by Kelm.

First, Morgan admitted that since October she had begun a "dating" relationship with Shop Chair Galbraith. "A successful showing of bias on the part of a witness would have a tendency to make the facts to which he testified less probable . . . than it would be without such testimony." *U. S. v. Abel*, 469 U.S. 45, 51 (1984). "Bias is a term used in the 'common law of evidence' to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor or against a party," the Court explained, and "may be induced by a witness' like, dislike or fear of a party, or by the witness' self-interest." (Id. at 52.) Galbraith is one of Respondent's shop chairs at the Employer. The fact that Morgan had begun dating him by the time of the hearing, of itself, supplies some reason for her to, at least, "slant" her testimony, so that it would favor Respondent's interests. And the second objective factor surely shows that her testimony was slanted.

It is well-settled that prior statements of a witness which are inconsistent with her testimony "suggest that [the witness] is not a credible person." *U. S. v. Logan*, 121 F.3d 1172, 1175 (8th Cir. 1997). During cross-examination Morgan was shown a document that she had prepared and had given to Kelm, at his request. She wrote, "I have worked with Tim Kelm on the 3rd shift . . . and never had any kind of problems with him. We have always worked as a team being very productive work crew [&] being fun too [sic]."

It should be pointed out that cross-examining counsel never afforded Morgan "an opportunity to explain or deny" those statements which she had written, as should have been done under Fed.R.Evid. Rule 613(b). On the other hand, opposing counsel, who had called Morgan as a witness, never objected to any aspect of cross-examination regarding the statements that Morgan had earlier written nor, more importantly, to receipt into evidence of that written document. During redirect examination, moreover, Morgan was examined concerning the circumstances under which she had prepared the document for Kelm. During that redirect examination Morgan never denied the truth of those written statements about Kelm. And, as will

be seen, the document was not the sole evidence of earlier statements by Morgan denying that she had ever "seen or witnessed or heard of any improper behavior at all," as Anderson put it, by Kelm.

Before leaving for home after third shift ended on September 28, Schultz and Johnson approached Lorentz. "Tim had asked if I could go and talk to Jim and tell him my side of what went on," testified Johnson. So, she told Lorentz "that nothing had happened, that we get along great," she testified. Apparently Schultz needed no request that she speak with Lorentz. For she testified that she went to Lorentz when he "came in at 7 o'clock," telling him "that I had heard what—that Tim had been accused of inappropriate touching and that there was no reason—I had never witnessed anything like that and I was worried about him losing his job." Later that day, according to Anderson, Lorentz told her about those remarks and "told me that I should speak with" those female third-shift employees. She testified that she did that the following morning.

During those individual interviews, Anderson testified, "each of them denied that anything like" coercion into stepping forward to Lorentz had occurred, denied having any reason for not doing so willingly, and denied having seen or witnessed or heard of any improper behavior that "had taken place" involving Kelm. Morgan did not dispute that testimony to the extent that those denials pertained to her. Asked if she had related, during the interview with Anderson, a conversation when she assertedly had asked Kelm to cease bothering her, Morgan answered generally and vaguely, "Yah, I told them I—you know, and I took care of it myself, and I didn't need"—until cut off by the examiner. But, no such statements are recited in Anderson's notes, as ones made by Morgan during Anderson's interview with her. There is no basis in the record for concluding that, had Morgan made such statements, Anderson had any reason for omitting what Morgan would have said.

Johnson corroborated Anderson's testimony and notes concerning what had been said during the former's interview. She testified that she had said "the same thing I had told Jim [Lorentz], that nothing had ever happened and that we get along good and some people just didn't like to see us getting along so good." In like vein, Schultz testified, "I told Sandy that I wanted her to know that I had never seen anything like this and that I was worried about Tim losing his job and that from the other girls that I had talked to they also said they didn't know where this came from."

Then, Anderson turned to interviewing Hummel. In her notes she recites that Hummel had said, "there were conversations during lunch between Tim and the women which Bob [Hummel] feels is objectionable," but that Hummel "wouldn't quote specific conversations, or say when he heard it." Anderson testified that when, during the interview, "we asked him what he had seen or what he had witnessed," Hummel became "real reluctant but he said that he . . . overheard some conversation at the picnic table that he thought was objectionable," or "that during their break at the picnic table there was conversation between Tim Kelm and the women on third shift that he thought was objectionable." However, when she "asked him what exactly was said . . . he wouldn't tell me. He refused to say," she continued. Anderson reiterated that, "He was real vague. He didn't say exactly when it was. He wouldn't say what exactly was said."

Hummel never disputed any aspect of Anderson's above-quoted testimony and the substance of her notes about what he had said during the investigative interview. "The company called us in," he testified, "and they asked if I had made a charge against [Kelm] for sexual harassment and I told them 'no.'" "I was surprised" at being contacted, he asserted, "because I didn't think there was any merit to it."

During cross-examination an effort was made to extract from Hummel precisely what he had said to Anderson. Asked if he had told anybody from the Employer about lunchtime conversations between Kelm and women on his shift, Hummel responded, "Only in the meeting that Jim Lorentz and Sandy called. They called me to ask about the meeting." Asked what he had told Lorentz and Anderson, Hummel answered, "The same thing I said here." Hummel was then asked, did that mean that he had related lunch period conversations that he thought might be inappropriate. "Well, whether I think it's inappropriate or not, doesn't make any difference," he responded, "it's up to the person that thinks it is under sexual harassment if a girl wants to complain about it then it's up to her to complain if she thinks it's—if the person says to stop and if they don't stop then that's sexual harassment in my eyes." It should not be overlooked that this testimony by Hummel has some similarity to what he testified he had said to Stanton and Banker on September 25: that "if a girl wants to complain . . . then it's up to her to complain." At no point did Hummel claim that he had described to Anderson and Lorentz any specific female employee who had been subjected to sexual harassment by Kelm on any particular occasion.

Having completed her investigation, Anderson testified that "the only allegations that we had received or that we had received word of were from Bob Hummel and those were so vague and they were—we couldn't substantiate anything." So, she testified, "we felt that nothing had taken place and no disciplinary actions were taken." Asked her opinion of what would have been the result had those allegations been substantiated, Anderson answered, "Depending upon the severity, but quite possibly Tim would have been dismissed immediately. That would be my guess." She was not alone in harboring that opinion.

As pointed out at the beginning of subsection C above, Banker testified that, in light of Kelm's 1997–1998 experience, Banker had heard "the rumor . . . that [Kelm] would be released for that kind of behavior," after Kelm's rehire. Apparently Stanton also would have realized that Kelm would be fired for repetition of sexual harassment. For, he acknowledged that by September he had known "what had been shared at the shop, which would be rumor" concerning the earlier accusation against Kelm and his resultant resignation. Stanton also acknowledged knowing that by the time that Kelm had been rehired, sexual harassment had become a heightened issue: "That is true."

Two other events arose in connection with the Employer's investigation of Respondent's September 26 report about Kelm. First, as described in subsection C above, Stanton portrayed Respondent's quite limited ability to have investigated any

misconduct by Kelm on the Employer's premises. Both Stanton and Banker testified that shop chairs were not permitted to engage in union business "on the clock on the premises," as Stanton put it. All else aside, however, their explanation becomes somewhat difficult to fully credit in light of an incident recounted in Anderson's notes: "Wednesday afternoon 9/27/00 [Shop Chair] David Galbraith approached Carole Kraklau, and asked her about a previous incident with Tim Kelm. (There had been an investigation of harassment in January of 1998, where Tim had allegedly been harassing Carole.)" Unable to locate Lorentz, Kraklau complained to Bindery Manager Todd Stordahl that "some press guy was grilling her," the notes continue, and that she wanted "nothing to do with this circus," after which a "very upset" Kraklau was excused from work for the remainder of that day.

Second, Hummel acknowledged that he "came to Kelm" after his investigative interview, and "just basically apologized to him for the statement that I made at the union meeting because it wasn't intended to get him in trouble or anything like that. It wasn't a charge against him for sexual harassment and I just never meant it to go that far." Asked to further recite what he had said to Kelm, Hummel testified, "That I had said that somebody had said that he had been fired before for sexual harassment and that I had brought up the subject that if one of the girls wanted to complain that they could and I was sorry for saying that . . . because . . . there wasn't really any merit to it."

Hummel's above-quoted testimony at least tends to show that he had made his September 25 statements with some realization that Kelm might suffer some employment disadvantage, were his statements to be repeated to the Employer. That becomes even more apparent from Kelm's testimony about Hummel's apology—testimony that Hummel never disputed. Kelm testified that Hummel "did not relate . . . to me" what he had told Banker on September 25. But, according to Kelm, Hummel did say "that he was approached after the union" meeting on that date by "Dean Stanton and Tony Banker" and that they "asked how to get rid of Tim Kelm and he said he just told them that if you get him on sexual harassment like you did before then—go do it." Throughout cross-examination, Kelm held firm in that testimony that Hummel had said "the union had asked me how to get rid of you"; "get him on sexual harassment"; and, "how to get rid of me."

I. DISCUSSION

According to the General Counsel's argument, Respondent's September 26 report to the Employer had been made because of Kelm's dissident—"refrain from," within the meaning of Section 7 of the Act—expressions during the September 25 morning meeting. Furthermore, Respondent had made that September 26 report with the understanding that it would lead the Employer to investigate Kelm's conduct and, should some female employee choose to complain about him, Kelm would be disciplined, even discharged, thereby eliminating one of the dissident employees from the bargaining unit. In the process, that would demonstrate to other dissident, and potential dissident, employees that Respondent was not reluctant to attempt to adversely affect their job opportunities should they engage in or continue to engage in statutorily protected "refrain from" activities. In the final analysis, that argument rests on three well-settled premises under the Act.

First, labor organizations have "a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise [their] discretion with complete good faith and honesty, and to avoid arbitrary conduct." (Citation omitted.) *Vaca v. Sipes*, 386 U.S. 171, 177 (1967).

Second, there is a "wall erected by the Act between organizational rights and job opportunities." *Lummus Co. v. NLRB*, 339 F.2d 728, 734 (D.C. Cir. 1964). "Integral to the policy underlying Section 8(b)(1)(A) and (2) of the Act is the intent to separate membership obligations owed by employees to their bargaining representatives from the employment rights of those employees." (Footnoted citations omitted.) *Electrical Workers IBEW Local 1547 (Rogers Electric)*, 245 NLRB 716, 717–718 (1979). Thus, for example, whenever a labor organization's "action, directed to an employer was intended . . . to encourage individuals to accept the authority of union officers," id., that action crosses over the above-mentioned "wall" that the Act has erected to "separate membership obligations" from "employment rights of employees." So central to the statutory prohibition is that separation that whenever a labor organization "causes the discharge of an employee, there is a rebuttable presumption that [the labor organization] acted unlawfully because by such conduct [it] demonstrates its power to affect the employees' livelihood in so dramatic a way as to encourage union membership among the employees." (Citation omitted.) *Operating Engineers Local 478 (Stone & Webster)*, 271 NLRB 1382, fn. 2 (1984).

It is from those two premises that the General Counsel advances the argument that Respondent acted discriminatorily in making the September 26 report to the Employer and, in doing so, it clearly understood that the Employer would make an investigation that, depending upon whether some female employee was willing to accuse Kelm of harassment, could cause Kelm to be discharged. Not so, counters Respondent. In initiating the September 26 report, it urges, Stanton had been motivated by nothing other than genuine concern with at least the possibility of inappropriate conduct by Kelm toward female employees.

No question that, read literally, Sections 8(b)(2) and 8(a)(3) of the Act specify only, in essence, failure to satisfy union security obligations as a basis for allowing labor organizations to lawfully cause or attempt to cause an employer to discharge an employee. That, of course, is not the situation presented here. Even so, under the Act a labor organization can engage in statutory "cause or attempt to cause" conduct "not only when the interference with employment was pursuant to a valid union-security clause but also in instances where the facts show that the union action was necessary to the effective performance of its function of representing its constituency." *Operating Engineers Local 18*, supra.

True, ordinarily that "necessary to the effective performance" qualification or limitation, to the basic statutory prohibition, arises in hiring hall settings. See, e.g., *Stage Employees IATSE Local 720 (AVW Audio Visual)*, supra. Clearly, however, its application is not confined to hiring hall settings. It also is applicable in other contexts arising under Section

8(b)(1)(A) and (2) of the Act. For example, the Board held in *Millwrights Local 1102 (Planet Corp.)*, 144 NLRB 798, 800–801 (1963), that the limitation or qualification encompassed a discharge demand based on the, in effect, conspiracy between an alleged discriminatee-employee and his employer to violate provisions of a collective-bargaining contract between that employer and the respondent. Such a discharge demand "would not have had the effect of preferring union members over nonmembers, or one class of union members over another," the Board pointed out, because the contractual "provision was clearly for the benefit of employees generally," and noncompliance with it could "properly" be viewed "as undermining an important element of its negotiated" contract provisions.

In like vein, demand that an employee be discharged for "embezzlement of a substantial amount of union funds" was held not to violate the Act in *Philadelphia Typographical Union 2 (Triangle Publications)*, 189 NLRB 829 (1971). In reaching that conclusion, the Board pointed out that the embezzlement was "so inconsistent with ordinary concepts of honesty as to dispel any notion that the Union's interference might be construed as having a foreseeable consequence of encouraging union membership." (Id. at 830.)

The foundation issue here, therefore, is the actual motivation of Respondent—specifically, Stanton—for initiating a report about Kelm to the Employer on September 26. For, the third of the above-mentioned well-settled principles is that it is "the 'true purpose' or 'real motive' behind the actions of," *Lummus Co. v. NLRB*, supra, a labor organization which determines whether its demands were actually motivated by "purely personal or arbitrary reasons," *Fruin-Colnon Corp. v. NLRB*, 571 F.2d 1017, 1023 (8th Cir. 1978), or, instead, were "necessary to the effective performance of its function of representing its constituency." *Operating Engineers Local 18*, supra.

It would be difficult to argue that the "effective performance" qualification or limitation does not encompass reports to an employer by a labor organization of one bargaining unit member's sexual harassment of another bargaining unit member or members. "Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the artificial barrier to sexual equality at the workplace that racial harassment is to racial equality." *Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir. 1982), quoted with approval *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 66–67 (1986). Primary and most immediate and effective ability to prevent sexual harassment at workplaces lies with employers who control those workplaces. See, e.g., *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). So, it can hardly be contended, at least in the abstract, that labor organizations act for other than "the benefit of employees generally," *Operating Engineers Local 478 (Stone & Webster)*, supra, whenever reporting to employers sexual harassment of bargaining unit members, even when the perpetrator of such misconduct is another bargaining unit employee.

Even so, "the Board must evaluate the union's conduct not in the abstract, but in terms . . . of its 'true purpose' or 'real motive.'" *Millwrights Local 1102 (Planet Corp.)*, supra, at 800. The unfortunate fact is that it is not unprecedented under the Act for a party to utilize protected-class status as, in effect, a pawn to try disguising motivation actually unlawful or, at least, aimed at accomplishing objectives elsewhere. For example, a charging party-employee attempted to cloak as statutorily protected activity what turned out to be false accusations about supposed derogatory racial and sexual-orientation remarks by a respondent's executive board members. That employee's true objective for doing so had been aimed actually at either "punishing the executive board for not having rescinded her suspension or . . . to compel [the] executive board to bend to her wishes" regarding a termination grievance. *Communication Workers Local 6360*, 268 NLRB 812, 820 (1984). In *Handicabs, Inc.*, 318 NLRB 890 (1995), enfd. 95 F.3d 681 (8th Cir. 1996), cert. denied 521 U.S. 1118 (1997), a respondent-employer attempted to justify its unfair labor practices by advancing as a defense the plight of the handicapped and disabled. Most significant to the situation presented in the instant case, a respondent-union reported to an employer supposed racial slurs by a dissident-employee as a vehicle for attempting to have that employee "suffer discipline from the employer, discipline which would have affected his job security or tenure and discouraged him from engaging in protected activities," *Paperworkers Local 1048 (Jefferson Smurfit Corp.)*, 323 NLRB 1042, 1044 (1997).

Consequently, the foundation issue here is whether Respondent's "true purpose" or "real motive," in making the September 26 report to Anderson, had been genuine belief that Kelm might be engaging in inappropriate conduct toward female coworkers or, rather, had been motivated not by such a genuine belief, but had been no more than a vehicle for possibly causing Kelm to "suffer discipline" for having engaged in activity protected by Section 7 of the Act, thereby "discourag[ing] him [and other dissident, or potentially dissident, employees] from engaging in" activity protected by the Act. If the latter, then Respondent's September 26 report had constituted an effort to restrain and coerce employees from engaging in "refrain from" activity protected by Section 7 of the Act and, also, to attempt to cause an employee to be discharged.

Even as an objective matter, it is difficult to conclude that, based on his own testimony about the scant and indefinite information stated by Hummel on September 25, Stanton could have genuinely believed that Kelm might have engaged in improprieties toward female coworkers. As set forth in section I,B, supra, Stanton testified that he had been told only that Hummel "felt that Tim Kelm was beginning to have inappropriate . . . interactions . . . toward female coworkers," and had been making "inappropriate sexual comments" or, at least, "[i]nappropriate comments" to female employees. That is all the information that Stanton testified had been made available to him. Thus, it had been only such scant and indefinite information that, according to Stanton, had motivated him to make his report to Anderson on the following day. Comments so vague are surely slender reeds for a labor organization to rely on in later asserting that it acted in "complete good faith and honesty," *Vaca v. Sipes*, supra, when reporting an employee for misconduct to his employer. All else aside, no one disputes that Hummel had been present

when Stanton testified to having been given the above-quoted information. Yet, there is no evidence whatsoever that Stanton had made the least effort to learn from Hummel what specific "interactions" and "comments" had been occurring. Instead, so far as the evidence shows, Stanton had simply seized on those vague and unparticularized statements by Hummel and, during the following day, reported to the Employer "that [a] coworker had said that he believed that Tim Kelm was acting inappropriately toward female coworkers."

The fact is that even that testimony by Stanton was not corroborated by Hummel, the source of the adverse September 25 remarks about Kelm. As set forth in section I,B, supra, Hummel testified that, during a post-meeting conversation that day about Kelm "not [being] for" Respondent during the meeting, "somebody stated that Tim had been fired once before for sexual harassment," and it had been that statement which had led him to volunteer "that if one of the girls on the third shift wanted to complain about that . . . they probably could." Note that Hummel did not testify that there actually *was* a female employee who had a complaint about Kelm's conduct. Nor did he testify that any female actually *would* complain about Kelm. He stated no more than that a female employee might want to complain about Kelm. Moreover, based on Hummel's testimony there is a direct connection from discussion of Kelm's statutorily protected "refrain from" activities and expressions, to discussion of Kelm's past sexual harassment consequences and, then, to an expression of possibility that some female employees might want to, in effect, again complain about Kelm. "The inference of a cause-and-effect relationship . . . is a strong one." *NLRB v. Adams Delivery Service*, 623 F.2d 96, 99 (9th Cir. 1980). That is, that the possibility of complaint about Kelm was being considered directly because of his expressions of dissatisfaction with continuing to support Respondent as the bargaining representative of the Employer's employees.

That connection is shown even more graphically by Hummel's later undisputed remark to Kelm, during the apology conversation described in section I,D, supra. At that time, Hummel stated that Stanton and Banker had "asked how to get rid of Tim Kelm and [Hummel] . . . just told them that if you get him on sexual harassment like you did before then—go do it." Regardless of the validity of Hummel's opinion of 1997–1998 events, his undisputed remark to Kelm shows that attributing inappropriate conduct toward females by Kelm, on September 25, had been raised directly in response to a conversation about "how to get rid of Tim Kelm," because of the latter's statutorily-protected "refrain from" activities and expressions.

While testifying Hummel appeared somewhat akin to a deer caught in the headlights. He did not seem opposed to Respondent, nor to continued representation by it. On the other hand, he did not seem to harbor any hostility toward Kelm. He had made a seemingly spontaneous remark on September 25 to Stanton and Banker and, it turned out, that remark had been utilized as a springboard for Respondent's report to the Employer that led to trouble for Kelm—to an investigation that could have led to Kelm's discharge. In consequence, when testifying, Hummel found himself caught between opposing forces, neither of which he opposed—found himself caught between crossing the road to one side or returning to the other side. However, unlike Morgan, Hummel did not appear disposed to tailor his testimony to the disadvantage of either side. Instead, he sometimes resorted to vague and unparticularized testimony. Other times he appeared to retreat into pleas of lack of recollection. When he did provide concrete accounts, Hummel appeared to be testifying candidly and, further, that testimony found support for the most part in other, more objective, evidence. I credit Hummel's accounts of a direct "cause-and-effect relationship," id., between September 25 conversation about dissatisfaction with Kelm's "not [being] for" Respondent and a possibility that some female employee might again complain about Kelm's misconduct toward her—a complaint that, Respondent realized, would likely cause Kelm to be fired, thereby removing him and his dissidence from the bargaining unit at the Employer.

In addition to Hummel's testimony, Stanton's credibility was not aided by the conflicts between his testimony and that of other witnesses, as described in sections I,B, and C, supra. Moreover, there are certain objective factors present which reinforce a conclusion that, rather than being motivated by any genuine concern about improprieties by Kelm toward female employees, Respondent's true motive for reporting him to the Employer on September 26 had been retaliation for Kelm's antiunion expressions during the September 25 meeting with third-shift employees, and the potential for subsequent opposition to Respondent should a decertification election eventuate.

First, during the September 25 third-shift meeting Kelm had been one of the employees—the most vocal one, according to Shop Chair Galbraith—who voiced dissatisfaction with Respondent's representation and, Stanton admitted, who expressed the view that continued representation by Respondent "wasn't necessary." To the extent that those remarks expressed desire to "refrain from" continuing to assist Respondent, and continuing to bargain with the Employer through Respondent, they are remarks protected by Section 7 of the Act.

When evaluating employer-motivation under Section 8(a)(3) of the Act, the fact that an alleged discriminatee has been a union activist is one indicium for inferring unlawful motivation. See *Handicabs, Inc.*, supra, at 897, and cases cited therein. There seems no logical reason for not applying that same analytical indicium to statutorily protected "refrain from" activities, when evaluation motivation by labor organizations.

True, Kelm was not the lone third-shift employee who voiced "refrain from" sentiments during the September 25 meeting with those employees. But he was the most vocal of those employees, according to Galbraith. In any event, as is true when evaluating employer-motivation, id. at 897–898, unlawful motivation is not somehow disproved by the fact that a respondent did not retaliate against each and every employee engaging in statutorily protected activities. To the contrary, selection of even a single one of them for retaliation serves the objective of creating an example of what can befall other employees, should they engage or continue engaging in similar statutorily-protected activities, *NLRB v. Shedd-Brown Mfg. Co.*, 213 F.2d 163, 175 (7th Cir. 1954), thereby creating "an *in ter-*

rorem effect," *Rust Engineering Co. v. NLRB*, 445 F.2d 172, 174 (6th Cir. 1971), on others who harbor, or might come to harbor, "refrain from" attitudes. Indeed, by using Kelm as an example of what could befall a dissident, Respondent could effectively try to quell dissident-sentiment which could lead to filing of a petition to decertify it as the bargaining agent of the Employer's production and maintenance employees, thereby "so extinguish[ing] seeds [of opposition to its continued representation that] it would have no need to uproot sprouts," *Ethan Allan, Inc. v. NLRB*, 513 F.2d 706, 708 (1st Cir. 1975), during a decertification election campaign.

A second, most compelling, indicium of unlawful motivation is timing. Kelm objected to continuing support for Respondent, and to its continued representation of the Employer's employees, during a meeting on September 25. The report to Anderson about Kelm supposedly "acting inappropriately toward female coworkers" was made on the very next day. Such "stunningly obvious timing," *NLRB v. Rubin*, 424 F.2d 748, 750 (2d Cir. 1970), "render[s] the motive suspect," *NLRB v. J.W. Mortell Co.*, 440 F.2d 455, 457 (7th Cir. 1971), and "vulnerable," *NLRB v. Dee's of New Jersey*, 395 F.2d 112, 115 fn. 4 (3d Cir. 1968). See also *NLRB v. Council Mfg. Co.*, 334 F.2d 161, 164 (8th Cir. 1984).

Respondent seeks to rebut any such inference based on timing—indeed, to attempt to turn it on its head—through Stanton's testimony, described in section I.C., supra, that there would have been no labor-management meeting after September 26 for 3months, until December. Thus, proceeds its argument, Stanton would have had to wait 3 months to report any improprieties by Kelm. Any such must-do-it-now-or-wait-for-3-months argument, however, founders in the face of certain other evidence. As also set forth in section I,C, supra, Anderson testified that Stanton could always have telephoned her with information. In fact, Respondent had contacted the Employer about employees who became delinquent in their dues, she further testified. Neither Stanton, in particular, nor Respondent, in general, challenged any aspect of that testimony. Indeed, at no point did Respondent explain why it could not have, first, investigated further what Hummel said on September 25, assuming that it genuinely lent some credence to what Hummel was saying, and, then, telephoned Anderson to arrange a meeting to discuss any specific and concrete information about Kelm. As it turns out, the fact that Stanton advanced so inherently unreliable an explanation, for having chosen to report Kelm on September 26, serves to further undermine reliability that might be accorded to his testimony.

That latter point leads to consideration of a third indicium of unlawful motivation: Respondent made no effort whatsoever to "engage in any independent investigation of" *Handicabs, Inc. v. NLRB*, 95 F.3d 681, 685 (8th Cir. 1996), cert. denied 521 U.S. 1118 (1997), what Hummel had said on September 25. Related to that indicium is a fourth one: Respondent made no effort, before reporting to the Employer, to contact Kelm and afford him an opportunity to explain his side of the suggestion made by Hummel. Failure to at least do that "shows that Respondent was not truly interested in whether misconduct actually had occurred." (Citations omitted.) *Handicabs, Inc.*, supra, 318 NLRB at 897.

As described in section I,C, supra, Respondent attempts to explain away its failure to conduct any investigation, before having reported Kelm to the Employer on September 26, by arguing that Stanton has virtually no access to bargaining unit employees while they are on the Employer's premises and, further, that shop chairs are not allowed to conduct union business during worktime. The evidence underlying those arguments is not disputed. But, that evidence does not supply a reason for Stanton's above-mentioned failure to have questioned Hummel further after the September 25 third-shift meeting, to try ascertaining if there was any concrete basis for a conclusion that Kelm might have been engaging in appropriate actions toward female employees.

Furthermore, as pointed out in section I,C, supra, after concluding his morning meeting with third-shift employees, Stanton seemingly had some time on his hands until being able to meet with the next shift of the Employer's employees. Surely it was possible, during that hiatus, for him to have made some effort to at least try to telephone one or more of the third-shift female employees, in an effort to ascertain if any of them believed she had been harassed inappropriately by Kelm. For that matter, surely it was possible for Stanton to have at least tried to telephone Kelm during that period, to ascertain whether he denied, or at least could explain, any conceivably inappropriate conduct toward one or more third-shift female employees. Taking the matter one step further, Stanton was in Brainerd on September 26, to participate in the labor-management meeting. No evidence explains why, on that day, he had not first gone to the perimeter of the Employer's premises and, there, made an effort to speak with Kelm and third-shift female employees, as they left work, about any supposed improprieties toward female employees by Kelm. Beyond that, of course, shop chairs seemingly had access to those employees during breaks, lunch, and, as well, before and after work.

In sum, Stanton's limited access to the Employer's premises and restrictions on shop chairs while working do not truly support an argument that Respondent lacked opportunity to investigate Kelm's conduct, and to afford him an opportunity to deny or explain his conduct, before rushing to report Kelm to the Employer. But Respondent has another string to its bow of defense for failure to conduct any investigation: that it had no obligation to conduct any investigation.

Well, neither has Respondent shown that it is obligated to report infractions of the Employer's sexual harassment policy. The fact is that, whenever a labor organization undertakes to report a work-rule infraction by an employee whom it represents, it creates an inherent conflict in its position: that of accuser and of representative during any subsequent grievance proceeding arising from action an employer may take against that employee. See, e.g., *Tenorio v. NLRB*, 680 F.2d 598 (9th Cir. 1982). Certainly, as pointed out above, labor organizations are allowed to do so under the Act for "effective performance of [their] function of representing [their] constituenc[ies]." *Operating Engineers Local 18*, supra. But, given the "wall erected by the Act between organizational rights and job opportunities," *Lummus Co. v. NLRB*, supra, and given their obligation to deal with employees they represent "with complete good faith and honesty, and to avoid arbitrary conduct," *Vaca v.*

Sipes, supra, that inherent conflict gives rise to a statutory obligation that labor organizations conduct some investigation before putting an employee's job at jeopardy through factually baseless accusations to an employer.

A contrary conclusion allows labor organizations to take action that, at the very least, is fairly characterized as being arbitrary—"so far outside a 'wide range of reasonableness,' *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953), as to be irrational." *Air Line Pilots v. O'Neill*, 499 U.S. 65, 67 (1991), quoted in *Stage Employees IATSE Local 720 (AVW Audio Visual)*, supra. Not only could such a report lead an employer to take action that adversely affects the reported employee's job, but it leaves the labor organization in the inherently conflicting position of having to represent in ensuing disputes resolution proceedings the very employee whom, though its report to the employer, it caused to be disciplined.

In any event, there is no credible evidence supporting Respondent's contention that it had genuinely believed that Kelm had engaged in improprieties toward female coworkers, when it made the September 26 report to the Employer. Instead, as reviewed above, a preponderance of the credible evidence establishes that the "true purpose" or "real motive" for that report had been an intention to retaliate against an employee for engaging in "refrain from" activities and expressions protected by Section 7 of the Act. In short, Respondent's "true purpose" or "real motive" had been a discriminatory one. From that foundational conclusion, certain consequences flow under the Act.

Based on the evidence reviewed in section I,D, supra, in fact there is no credible basis for concluding that Kelm had engaged in any improprieties toward female employees. To be sure, there had been horseplay among, at least, some of the Employer's third-shift employees. But, there is no evidence that it rose to the level of harassment, nor even impropriety, given "genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex," *Oncala v. Sundowner Offshore Services*, supra, in their workplaces. That is the best that the evidence shows had been occurring during the Employer's third shift prior to September 25.

Kelm obviously was aware that that was the situation as of that date: that he had not, in fact, been engaging in any sexual harassment of, nor improprieties toward, his female coworkers. So, too, were third-shift female employees aware that they had not been targets of sexual harassment or improprieties by Kelm. In addition, those third-shift employees, including Kelm, knew that Kelm had voiced dissident remarks during Respondent's meeting with third-shift employees on September 25. Moreover, they became aware that it had been Respondent who had taken the action which had led the Employer to investigate Kelm's conduct. As an objective matter in the totality of those circumstances, employees would naturally conclude that there was a cause-and-effect relation between Kelm's dissident remarks during the September 25 meeting and Respondent's baseless report to the Employer which led the latter to initiate an investigation of conduct by Kelm in which he had never engaged.

That investigation could have adversely affected Kelm's employment opportunities. The fact that it had been initiated by Respondent's report, accordingly, had a natural tendency to serve as a warning to employees about what could happen to them, should they choose to speak out against Respondent, or take action which could terminate its continued representation of the Employer's production and maintenance employees. Therefore, Respondent's conduct had a natural tendency to restrain and coerce employees in the exercise of statutorily protected "refrain from" activities, and violated Section 8(b)(1)(A) of the Act.

Respondent attempts to escape that conclusion by arguing that its agents did not publicize what was reported to Anderson on September 26—never told any employee that it had made such a report to her. That is accurate. But it does not salvage Respondent's situation. "As long as the employees had actual knowledge of the Respondent's illegal [conduct], it is irrelevant whether they learned of the Respondent's action directly from the Respondent's agent or from another source." *Graphic Communications Local 458 (Noral Color)*, 300 NLRB 7, 11 fn. 13 (1990). And in the final analysis it should have seemed foreseeable to Respondent that employees would learn that it had been the source of that report.

Stanton admittedly knew that the Employer would be conducting an investigation based upon his report to Anderson. It was foreseeable that at least some employees would question why they were being asked about Kelm's conduct. Surely, Kelm would be questioning the cause of the investigation, given that he had to defend his own conduct against, at least, the implication of improprieties toward female coworkers. It is long settled "a man is held to intend the foreseeable consequences of his conduct." *Radio Officers v. NLRB*, 347 U.S. 17, 45 (1954). Therefore, Respondent is not somehow absolved of its violation of Section 8(b)(1)(A) simply because its agents did not publicize the fact that it had made the report which had led the Employer to investigate Kelm.

Turning, secondly, to the alleged violation of Section 8(b)(2) of the Act, it should be emphasized that that statutory provision does not simply prohibit conduct rising to the level of "cause." It also prohibits labor organizations from "attempt[ing] to cause."

Respondent could fairly foresee that some consequence would occur as a result of its September 26 report to Anderson. Indeed, Stanton effectively conceded that he anticipated that an investigation by the Employer would be the result of that report. As concluded above, Respondent has not credibly shown that Stanton genuinely believed that Kelm may have engaged in sexual harassment and improprieties toward female coworkers. Rather, a preponderance of the credible evidence shows that he made that report in retaliation for Kelm's statutorily protected "refrain from" activities. Yet, had some female employee falsely complained about Kelm during that investigation, as Morgan appeared to be attempting to do when appearing as a witness, then all knew that Kelm would have likely been discharged. In fact, there is a strong suspicion that that had been what Galbraith had been attempting to accomplish through his conversation with Carole Kraklau, discussed in section I,D, supra. After all, Kraklau had not been involved with Kelm during 2000, so far as the evidence shows, but she had been the one who had complained about him almost 3 years earlier.

In any event, the Act prohibits both causing and, separately, attempting to cause employer-discrimination. It does not restrict the unfair labor practice which it prohibits to successful action by labor organizations. By making the September 26 report for unlawful reasons, Respondent obviously anticipated that the ensuing investigation might unearth some information that would lead the Employer to fire Kelm. That expectation, based on an unlawfully motivated report, is sufficient to establish an "attempt to cause" within the meaning of Section 8(b)(2) of the Act. For, the Act "aims at every practice, act, source or institution which in fact is used to encourage and discourage union membership by discrimination in regard to hire or tenure, term or condition of employment. *Teamsters Local 357 v. NLRB*, 365 U.S. 667, 676 (1961). Any contrary conclusion would leave dissident employees at the mercy of labor organization efforts to retaliate against dissidents through the simple device of making false and unlawfully motivated reports about misconduct, in the hope that investigation of those reports might disclose some information that would leave those employees vulnerable to discharge. The very fact of an employer's investigation would naturally tend to discourage statutorily protected "refrain from" activity by employees.

CONCLUSION OF LAW

Graphic Communications International Union, Local 1-M, a statutory labor organization, has committed unfair labor practices affecting commerce by reporting the possibility of misconduct by Timothy Martin Kelm to his employer, Bang Printing, Inc., in retaliation for Kelm's dissident activities protected by Section 7 of the Act, rather than because of any genuine belief that Kelm had engaged in such misconduct, thereby restraining and coercing Kelm and other employees from engaging in activities protected by Section 7 of the Act, in violation of Section 8(b)(1)(A) of the Act, and, in addition, attempting to cause the discharge of Kelm, in violation of Section 8(b)(2) of the Act.[3]

REMEDY

Having concluded that Graphic Communications International Union, Local 1-M has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and, further, that it be ordered to take certain affirmative action to effectuate the policies of the Act. With respect to the latter, ordinarily a labor organization committing unfair labor practices would be ordered to post a notice at its office, place of business and meeting places, with a copy of that notice mailed to the employer of the employees involved for posting, that employer being willing. Those remedial measures are ordered here. The problem, however, is that the affected employees are located in Brainerd, where Graphic Communications International Union, Local 1-M has no office, place of business or meeting place. In situations where there is no existing facility at which a respondent can effectively post a notice that affected employee will see, the Board has ordered that respondent to mail a copy of the notice to each affected employee. See, e.g., *Bridgeport Rolling Mills Co.*, 288 NLRB 275, 276 (1988); *TIC-The Indistrial Co.*, 320 NLRB 1122 fn. 2 (1996). Accordingly, an order to mail the notices to employees shall be ordered here.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

Graphic Communications International Union, Local 1-M, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Restraining or coercing Timothy Martin Kelm and any other employee by reporting employee-misconduct to Bang Printing, Inc., or to any other employer, as a means for retaliating against Kelm, or any other employee, for having criticized its performance, and having expressed an intention to refrain from continuing to support it, as the exclusive collective-bargaining representative of employees of Bang Printing, Inc., or any other employer.

(b) Attempting to cause Bang Printing, Inc., or any other employer, to investigate, discharge, or otherwise discriminate against Timothy Martin Kelm, or any other employee, for criticizing its performance, and for activities to refrain from continuing to support it, as the exclusive collective-bargaining representative of those employees.

(c) In any like or related manner restraining or coercing employees in the exercise of rights guaranteed them by Section 7 of the National Labor Relations Act.

2. Take the following affirmative actions necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its St. Paul, Minnesota office, place of business and meeting places copies of the attached notice marked "Appendix."[5] Copies of the notice on forms provided by the Regional Director for Region 18, after being signed by its duly authorized representative, shall be posted by Graphic Communications International Union, Local 1-M and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken by it to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Mail, at its own expense, a copy of the attached notice to all employees employed by Bang Printing, Inc. in Brainerd, Minnesota, who have been represented by Graphic Communications International Union, Local 1-M since April 13, 2000. Such notices shall be mailed to the last known address or each of those employees. Copies of the notice shall be signed by its

[3] To the extent that the motivation concluded to have existed may differ from that pled in the complaint, that subject has been fully litigated and, accordingly, can be evaluated and concluded to have violated the Act. *McKenzie Engineering Co. v. NLRB*, 182 F.3d 622, 626–627 (8th Cir. 1999).

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

authorized representative and mailed immediately upon receipt of the forms provided by the Regional Director.

(c) Sign and return to the Regional Director sufficient copies of the notice for posting by Bang Printing, Inc., if willing, at all locations where notices to its employees are customarily posted.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps it has taken to comply.